Cerny v. Marathon Oil Corp.: Texas Court Dismisses Landowner's Nuisance Claim Against Oil Drillers

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October 12, 2015

Last year, a Texas landowner was awarded $2.9 million in damages after a jury found that air emissions from nearby oil and gas drilling disturbed the owner's property and therefore constituted a nuisance. The award, which included $2.25 million for physical pain and suffering and $400,000 for mental anguish, was seen as a major victory for landowners concerned about the impacts of oil and gas drilling. At the time, lawyers speculated that it could trigger a slew of nuisance claims against drillers. While more claims have been brought, there have been no comparable landowner victories. On the contrary, many landowner nuisance claims have been rejected. Just this week, the Fourth Court of Appeals affirmed a decision of the Karnes County District Court,

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dismissing a nuisance action by a landowner who claimed to have suffered health problems due to nearby oil and gas operations.

The case centered on Michael and Myra Cerny. The Cerny family lives in Karnes County, south of Austin, in the heart of the Eagle Ford Shale. Believed to contain over 50 trillion cubic feet of gas and 3 billion barrels of oil, the Eagle Ford Shale has seen significant development in recent years, with over 7,000 wells drilled since 2008. Many of these wells are located in close proximity to homes. The Cernys, for example, have 37 oil wells within a two mile radius of their home. Almost half of those wells are less than a mile away. Also, within one to two miles of the Cerny's home, are four oil and gas processing facilities.

The Cernys claimed that, in 2012, they began to experience a variety of health problems including "daily headaches (often migraine), rashes, chest pain, bone pain, strange nerve sensations, high blood pressure, irregular heartbeats, nausea, irrigation of the eyes, nose and throat, bronchitis, pain in the liver area, numbness in the externalities, and difficulty breathing." The Cernys believe that these problems are the result of exposure to toxic chemicals from oil wells around their property. As wells surround the property on all sides, no matter the wind direction, the Cernys constantly smell noxious odors. This has, according to the family, caused physical health problems and mental anguish.

In May 2013, the Cernys brought a nuisance claim against two oil and gas companies – Marathon Oil Corporation and Plains Exploration & Producing Company – alleging that their operations "released strong odors and noxious chemicals" which caused the family's health problems. The claim was dismissed by the Karnes County District Court, whose decision was upheld on appeal, by the Fourth Court of Appeal. The decision could have important implications for other nuisance claims brought against oil and gas operators.

In *Cerny v. Marathon Oil Corp.,* No. 04-14-00650-CV, the court clarified the standard of causation for nuisance claims based on alleged exposure to toxic chemicals from oil and gas operations. The court held that, in such cases, the plaintiff's claims must be supported by qualified scientific expert testimony. If "direct,

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scientifically reliable proof of actual causation" is not available, the plaintiff must establish that exposure "more likely than not" caused their health problems by providing "at least two epidemiological studies demonstrating a statistically significant doubling of… [health] risk." The studies must relate to the same substance as the plaintiff claims to have been exposed to. The plaintiff's exposure must be comparable to or greater than that in the study. Exposure must have occurred before the onset of problems and the timing must be consistent with that in the study.

Applying this standard, the court held that the Cernys failed to establish that their health problems were caused by oil and gas operations, as opposed to something else in the air. Similar difficulties, in proving causation, may also be experienced by other landowners suing oil and gas operators. It may, for example, be difficult to prove causation where a landowner asserts that exposure to toxic chemicals from oil and gas operations worsened a pre-existing health condition. This is because, in such cases, the landowner may be unable to establish that his/her health problems arose after exposure.

The difficulties faced by landowners in brining nuisance claims against oil and gas operators highlight the need for additional regulation to prevent nuisances from happening the first place. In the past, local governments have played an important role in regulating oil and gas drilling. Many local governments have, for example, established setbacks requiring oil and gas wells to be located a minimum distance away from occupied structures. Here in Texas, Fort Worth requires all wells to be at least 600 feet from homes, schools, hospitals, and other protected areas. In neighboring Dallas, wells must to be at least 1,500 feet from protected sites.

In a number of states, the ability of local governments to adopt setbacks and other similar regulations has been restricted by legislation. In the spring, we wrote about proposed legislation (in Texas and elsewhere) pre-empting local regulation of oil and gas drilling. The Texas legislation, known commonly as House Bill 40, was enacted in May 2015. It limits the authority of local governments, which can now only regulate surface activities incidental to oil and gas operations, such as emergency response,

traffic, noise, and lights. The local regulations must be commercially reasonable and not effectively prohibit oil and gas operations.

Many commentators have expressed concern that House Bill 40 could discourage local regulation of oil and gas drilling. Unsure about what constitutes commercially reasonable regulation of drilling, some local governments may elect not to exercise regulatory authority. Without local regulation to restrict drilling, more wells may be sited close to homes, increasing the potential for nuisance claims. Just how those claims will play out remains to be seen.

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